

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PETRO ENTERPRISES, INC.	:	DETERMINATION
F/K/A DAN'S GROCERY CORPORATION	:	ON REMAND
	:	DTA NO. 806301
for Revision of a Determination or for Refund	:	
of Motor Fuel Tax under Article 12-A of the	:	
Tax Law for the Period December 1, 1984 through	:	
April 30, 1987.	:	

Petitioner, Petro Enterprises, Inc. f/k/a Dan's Grocery Corp., 50 South Niagara Street, Lockport, New York 14094, filed a petition for revision of a determination or for refund of motor fuel tax under Article 12-A of the Tax Law for the period December 1, 1984 through April 30, 1987.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 462 Washington Street, Buffalo, New York, on May 1, 1990 at 9:15 A.M. Petitioner filed an exception to the determination of the Administrative Law Judge issued on January 25, 1991 with respect to its petition. By decision dated September 19, 1991, the Tax Appeals Tribunal remanded this matter to the same Administrative Law Judge for further proceedings in respect of the issue set forth below. Petitioner appeared at all times herein by Robert A. Zucco, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE ON REMAND

Whether petitioner was the subject of unconstitutional selective enforcement of the Tax Law by the Division of Taxation.

FINDINGS OF FACT ON REMAND¹

¹This determination is being issued pursuant to the decision of the Tax Appeals Tribunal dated September 19, 1991 and is limited to the selective enforcement issue set forth herein.

With respect to the issue on remand, petitioner submitted affidavits of Daniel J. Zucco and Andrew A. Zucco, each sworn to on November 19, 1991. Daniel J. Zucco is petitioner's president. Andrew A. Zucco is employed by petitioner. His duties include accounting and bookkeeping.

In response to petitioner's submission of affidavits, the Division of Taxation submitted the affidavit of Arthur J. Maloney, sworn to on January 21, 1992, and the affidavit of Richard LeMaster, sworn to on January 28, 1992. During the period at issue, Mr. Maloney was employed by the Division as a Tax Auditor II and was the supervisor of the Excise Tax program in the Division's Buffalo District Office. Mr. Maloney supervised the audit in question. During the period at issue, Mr. LeMaster was employed by the Division as a Tax Auditor I. Mr. LeMaster conducted the audit in question.

In response to the Division's submissions, petitioner submitted an additional affidavit from Andrew A. Zucco, sworn to on February 6, 1992.

No hearing was held in respect of the issue on remand and therefore no testimony was taken. The decision to submit affidavits in lieu of a hearing was made by petitioner.

Petitioner has failed to establish as fact herein any of the allegations detailed below in paragraphs "6(a)" through "6(m)", "7" and

"10(a)" through "10(c)". (The reasons for this failure are discussed in Conclusion of Law "E" herein.)

SUMMARY OF FACTUAL ALLEGATIONS ON REMAND

In his affidavit, Daniel J. Zucco alleged the following:

- (a) That in June 1988 he visited five retail gasoline stations in the western New York area and that each such station sold home heating oil through metered pumps.
- (b) That no diesel motor fuel tax was charged or collected with respect to fuel sold

Accordingly, the Findings of Fact set forth in the prior determination of the Administrative Law Judge are not set forth herein.

through such pumps.

(c) That he, along with an employee, purchased home heating oil through such pumps which was dispensed into a five-gallon container and that, upon paying for the product, received a receipt.

(d) That none of the receipts received in connection with such purchases was endorsed with language "not to be used in the operation of a motor vehicle" nor was the purchaser required to provide his name and address.

(e) That Mr. Zucco contacted approximately 10 other businesses in western New York engaged in the sale of home heating oil through metered pumps and inquired as to whether such businesses had ever been audited or required to pay diesel fuel tax on the retail sale of home heating oil in small quantities.

(f) That all such businesses responded that they had never been audited and had never paid tax on such sales.

(g) That, despite the foregoing, petitioner was singled out for audit and had tax imposed upon it when petitioner's competitors were free from audits and were not required to collect and pay taxes on similar sales.

(h) That the auditor, Mr. Richard LeMaster, requested access to petitioner's records concerning the mileage of petitioner's diesel trucks in order to conduct an audit of the form MT-104's filed by the corporation covering the tax paid for the fuel used by those trucks.

(i) That, during the course of the audit, Mr. LeMaster acted in an unprofessional manner, and, following such conduct, Mr. Zucco advised Mr. LeMaster that he wished to consult with his lawyer regarding the audit.

(j) That in response to Mr. Zucco's statement, Mr. LeMaster stated words to the effect that Mr. Zucco did not need a lawyer and that a lawyer would only make things more difficult.

(k) That Mr. LeMaster further stated words to the effect that "I don't know what it is with you Italians. You're always running to get a lawyer. Now I find out the lawyer is just another member of your family. It's always a family thing with you people."

(l) That following these remarks Mr. LeMaster requested all corporate records and stated that he was now going to conduct a detailed audit of all corporate taxes.

(m) That Mr. LeMaster conducted a detailed audit "as he had never done before in the western New York area" because he harbored ethnic biases against Italian-Americans and because he wished to punish petitioner for seeking the assistance of legal counsel.

As noted, petitioner also submitted an affidavit of Andrew Zucco dated November 19, 1991. The allegations set forth in this affidavit were consistent with those set forth in the David Zucco affidavit.

In his affidavit submitted by the Division in response, Mr. Maloney alleged the following:

(a) That the audit in question was assigned to the Division's Buffalo District Office by the Division's Central Office in Albany in February 1987 as part of the normal routine of the Buffalo District Office.

(b) That the audit in question was one of 77 highway use tax audits assigned to the Buffalo District Office along with their respective diesel motor fuel and corporation tax audits at that time.

(c) That Mr. Maloney assigned particular cases to individual auditors.

(d) That in 1987 the excise tax program was responsible for 11 western New York counties as well as out-of-state audits and that the excise tax section conducted audits under Tax Law Articles 9, 12-A, 13-A, 18, 20, 21, 28 and 29.

(e) That the audit issues in the instant matter were common and were addressed in the same manner as similar audits conducted by the Buffalo District Office during the period at issue.

In his affidavit, also submitted by the Division in response, Mr. LeMaster alleged the following:

(a) That the audit in question was assigned to Mr. LeMaster by Mr. Maloney and that Mr. LeMaster had no part in the assignment process.

(b) That he reviewed the November 19, 1991 affidavit of Daniel Zucco and that he denied the actions and statements attributed to him in that affidavit (which actions and statements are summarized herein at paragraphs "6[h]" through "6[m]").

(c) That he specifically denied having made any remarks that would constitute ethnic slurs and that he has no bias against Italians or any ethnic group.

(d) That both he and his wife are of Italian heritage.

(e) That the audit was conducted in a professional manner; that the books and records requested were necessary to conduct a proper audit; and that he has conducted many detailed audits similar to the audit herein.

As noted, in response to the Division's submission of affidavits, petitioner submitted an affidavit of Andrew A. Zucco, sworn to on February 6, 1992, wherein Mr. Zucco alleged the following:

(a) That upon Mr. LeMaster's arrival, Mr. LeMaster stated he wished to conduct a highway use tax audit and that he did not mention any other taxes or returns at that time.

(b) That only following the alleged incidents involving Daniel Zucco and the auditor (described above in paragraphs "6[h]" through "6[m]") did Mr. LeMaster announce that the audit would include diesel fuel tax.

(c) That no corporation tax audit of petitioner was ever conducted.

CONCLUSIONS OF LAW ON REMAND²

A. As noted by the Tax Appeals Tribunal in its initial decision in this matter (Matter of Petro Enterprises, Inc. f/k/a Dan's Grocery Corporation, Tax Appeals Tribunal, September 19, 1991) to establish an unconstitutional claim of selective enforcement:

"there must be not only a showing that the law was not applied to others similarly situated but also that the selective application of the law was deliberately based upon an impermissible standard such as race, religion or some other arbitrary

²This determination is being issued pursuant to the decision of the Tax Appeals Tribunal dated September 19, 1991 and is limited to the selective enforcement issue set forth herein. Accordingly, the Conclusions of Law set forth in the prior determination of the Administrative Law Judge are not set forth herein.

classification"

(Matter of 303 West 42nd St. Corp. v. Klein, 46 NY2d 686, 416 NYS2d 219, 223).

B. The burden of proving the selective enforcement claim is upon the petitioner (see 20 NYCRR 3000.10[d][4]).

C. As to the first element of the selective enforcement claim, by letter of his representative submitted with the November 19, 1991 affidavits, petitioner contended that Daniel Zucco's allegations as detailed in paragraph "6(a)" through "6(g)" herein made a prima facie showing that the law was not applied to others similarly situated.

Even if one were to accept as fact the allegations made in the affidavit of Daniel Zucco and detailed in paragraph "6(a)" through "6(g)" herein, petitioner has failed to prove this contention nonetheless. The fact that 5 or 10 or even 15 "similar" businesses in western New York either employed recordkeeping methods similar to petitioner herein or have not been audited clearly does not prove that petitioner was singled out for audit. Further, there is no evidence in the record as to what constitutes a "similar" business; nor, assuming that similar businesses exist, is there any evidence as to the number of such businesses in western New York; nor is there any evidence that the businesses purportedly contacted by petitioner are representative of such businesses in western New York. Accordingly, there is insufficient proof in the record to make a case that petitioner was singled out for audit even if one accepts petitioner's allegations as fact. Additionally, petitioner's contention is countered by Mr. Maloney's allegation that the audit in question was one of 77 such audits assigned to the Buffalo District Office in February 1987.³

D. By letter dated February 6, 1992 and submitted with Andrew Zucco's February 6, 1992 affidavit, petitioner contended that the audit in question was improperly expanded beyond its initial scope following certain statements allegedly made by the auditor (such statements are

³While Mr. Maloney's allegation has not been found as fact herein, it effectively constitutes a denial to petitioner's allegation and, pursuant to the reasoning in Conclusion of Law "E", petitioner's allegation does not outweigh the Division's denial.

referred to herein in paragraphs "6[h]" through "6[m]"). Although not expressly stated in the letter, it would appear that petitioner takes the position that such improper expansion of the audit shows that the Division applied the law with an uneven hand against petitioner in accordance with the first element of selective enforcement. Petitioner contended that the only reasons offered for such expansion were the statements allegedly made by the auditor, i.e., that the audit was expanded because of the auditor's bias against Italian-Americans and also in retaliation for petitioner's assertion of its right to legal counsel. As noted, the affidavits of Daniel Zucco and Andrew Zucco alleged that, upon his arrival at petitioner's premises, Mr. LeMaster "requested access to the records of [petitioner] concerning the mileage of the corporation's diesel trucks in order to conduct an audit of the Form MT-104's filed by [petitioner] covering the tax paid for fuel used by those trucks." Andrew Zucco's February 6, 1992 affidavit alleged that Mr. LeMaster stated that he wished "to conduct an audit of the highway use

tax records of the corporation". The affidavits further allege that it was only after the statements by Mr. LeMaster that the audit was expanded.

Even assuming that all of petitioner's allegations are accurate, petitioner has nonetheless failed to prove that the audit herein was in any way expanded beyond its original scope. In other words, petitioner has not shown that its diesel motor fuel sales were not intended, from the beginning, to be part of the Division's audit. The fact that the auditor may have first requested records concerning the mileage of petitioner's trucks certainly does not prove that the audit was expanded beyond its original scope or that the audit was originally intended to cover only truck mileage. Further, if, as alleged in their affidavits, the auditor indicated that he intended to audit the "MT-104's" filed by the corporation, then it would seem that the audit was intended to cover diesel motor fuel tax since the Form MT-104.10 is the Diesel Motor Fuel Tax Return. Moreover, the allegation that the audit was expanded beyond its original scope is countered by statements contained in Mr. Maloney's affidavit indicating that the audit in

question was a "highway use and diesel motor fuel audit" and was assigned two case numbers; that the audit in question was one of 77 highway use tax audits assigned to the Buffalo District Office along with their respective diesel motor fuel and corporation tax audits; and that the excise tax audit section conducted audits under Articles 9, 12-A, 13-A, 18, 20, 21, 28 and 29.⁴

Accordingly, petitioner has failed to prove that the audit in question was expanded beyond its original scope.⁵

E. Petitioner has also failed to prove the second element of a selective enforcement claim. That is, petitioner has not shown an intentional, invidious plan of discrimination on the part of the Division (see, Matter of G & B Publ. Co. v. Department of Taxation and Fin., 57 AD2d 18, 392 NYS2d 938, 940, lv denied 42 NY2d 807, 398 NYS2d 1029; Matter of Petro Enterprises, Inc. f/k/a Dan's Grocery Corp., supra).

In its effort to prove this second element of selective enforcement, petitioner has submitted affidavits alleging certain statements and actions by the auditor which, according to petitioner, evince an anti-Italian bias on the part of the auditor and also show that the auditor attempted to "punish" petitioner for seeking to consult with its lawyer. In response, the Division submitted an affidavit from the auditor denying the allegations.

In order to determine whether petitioner has met its burden on this second element it must be determined whether the evidence submitted by petitioner should outweigh the evidence submitted by the Division. The question thus becomes one of credibility. Upon review of all of the evidence submitted in this matter, it is clear that petitioner has failed to meet its burden on this issue.

⁴See footnote 3.

⁵It should be noted that even if petitioner had proved that the audit in question was expanded beyond its original scope, the question of whether such expansion was improper remains unproven (see Conclusion of Law "E").

Since petitioner submitted affidavits in lieu of oral testimony to make its case on remand, the individuals making the allegations have not been subject to cross-examination. Moreover, I have not been given an

opportunity to observe the demeanor of these individuals under direct and cross-examination. Indeed, given the nature of the allegations, involving as it does the integrity and credibility of both the accuser and accused, it is surprising that petitioner would attempt to make its case by affidavit. Furthermore, the individuals making the allegations are both interested parties: Daniel Zucco is petitioner's president and Andrew Zucco is petitioner's employee. Finally, it should be noted that there is no independent evidence in the record to corroborate petitioner's contentions. Under such circumstances, the affidavits submitted by petitioner must be deemed insufficient to establish petitioner's contentions.

Essentially, this issue comes down to an accusation and a denial. Since the accuser has not established its credibility and since there is no independent corroborating evidence in the record, the allegation may not be given greater weight than the denial and must be rejected.

F. The petition of Petro Enterprises, Inc. f/k/a Dan's Grocery Corporation is denied and the Notice of Determination of Tax Due, dated July 31, 1987, is sustained.

DATED: Troy, New York
March 5, 1992

ADMINISTRATIVE LAW JUDGE